SUPREME COURT, U. S.

AUG 9 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOODS EXPRESS, INC., and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

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Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

Opinions Below.

The Order of the District Court for the Central District of California was issued on May 12, 1969, and, as yet, has not been reported. Said Order affirms the Decision of the Interstate Commerce Commission, dated July 29, 1968, and adopts as its own the Commission's Findings of Fact. The Commission Decision by Dando (short form decisional technique) adopts and affirms the Decision and Order of Review Board Number 3 of the Interstate Commerce Commission, dated April 18,

1968; finally, by the same Dando technique, said Review Board Number 3 of the Interstate Commerce Commission adopted and affirmed as amended, the Report and Order recommended by the Hearing Examiner dated December 14, 1964. Copies of the Court's Order dated May 12, 1969; Report and Order recommended by Hearing Examiner, dated December 14, 1967; Decision and Order of Review Board Number 3, Interstate Commerce Commission, dated April 18, 1968; and Decision of the Interstate Commerce Commission, Division 1, acting as an Appellant Division, dated July 29, 1968, are annexed hereto as Appendices A, B, C, and D, respectively, *infra*.

Grounds on Which Jurisdiction Is Invoked.

1. *The nature of the proceeding.* Appellant appeals from the judgment of a three-judge District Court of the United States (convened pursuant to 28 U.S.C. 2281) dismissing plaintiff's action to set aside a Decision and Order of the Interstate Commerce Commission Review Board No. 3, decided on April 18, 1968, denying appellant's Application for a Contract Carrier Permit.

2. *Date of Judgment or Order sought to be reviewed.* The Order sought to be reviewed was dated and entered May 12, 1969. No separate Order, Judgment or Decree was entered. There was no petition, application or request for rehearing. A Notice of Appeal to this Court was filed in the United States District Court, Central District of California, on June 10, 1969.

3. *Statutory provision re jurisdiction.* The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C. 1253.

4. *Cases sustaining jurisdiction.* Cases believed to sustain that jurisdiction are: *St. Louis and O'Fallon Ry. Co. v. U.S.*, Mo. (1929), 279 U.S. 461, 73 L. Ed. 798; *Rorick v. Board of Com'rs. of Everglades Drainage District*, Fla. (1939), 307 U.S. 208, 83 L. Ed. 1242; *Radio Corp. of America v. U.S.D.C.*, Ill. (1950), 341 U.S. 412, 95 L. Ed. 1062; *Zemel v. Rusk*, Conn. (1965), 381 U.S. 1, 14 L. Ed. 2d 179, Rehearing Denied, 382 U.S. 873, 15 L. Ed. 2d 114.

Statutes Involved.

Interstate and foreign commerce motor carriers are governed by Part II of the Interstate Commerce Act (Act) (49 U.S.C. 301-327). This Act is to be administered and enforced with a view to carrying out the National Transportation Policy as set out preceding Parts I, II, III and IV of the Act (49 U.S.C. preceding Sections 1, 301, 901, and 1001) and set forth in full in Appendix E.

The particular statutory provisions in question are:

49 U.S.C. 303(a)(15) which provides:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in Paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

49 U.S.C. 309(a) which requires a Permit issued by the Commission prior to engaging in contract carriage by motor vehicle in interstate or foreign commerce.

49 U.S.C. 309(b), which reads, in pertinent part, as follows:

> ". . . Subject to Section 310, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the application or from any hearing held thereon, that the applicants is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of this part and the lawful requirements, rules and regulations of the Commission thereunder, and the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit will have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and or its shipper and the changing character of that shipper's requirements . . ."

Additional sections of the Interstate Commerce Act involved are set forth in Appendix E.

The following portions of the Constitution of the United States are also involved:

ARTICLE I

Section 8. The Congress shall have Power . . . (Cl.3) to regulate commerce with foreign nations, and among the several states and with the Indian Tribes;

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; . . . nor be deprived of life, liberty, or property, without due process of law;

Questions Presented.

A. Whether a contract carrier applicant, dedicating its equipment to the continuing exclusive use of a single supporting shipper, is entitled to demonstrate a lesser quanum of proof upon applying the 49 U.S.C. 309(b) criteria than another applicant furnishing transportation services designed to meet the distinct need of each customer?

B. Whether the three-judge District Court below, in affirming the Commission Decision, misapplied 49 U.S.C. 303(a) (15) and 309(b) compelling appellant to meet all five criteria of 49 U.S.C. 309(b) as to *each* of the *two* shippers originally appearing in support of the Application, when in fact, at the time of the Commission's final Decision, there was but a single supporting shipper?

C. Whether the Commission misapplied the criteria "the number of shippers to be served" in the light of the Commission's established case precedent?

D. Whether the Commission erred in compelling appellant, an exclusive use applicant under 49 U.S.C. 303(a)(15)(a), to meet the criteria solely required of a distinct need service applicant under 49 U.S.C. 303-(a)(15)(b)?

E. Whether the Commission in compelling appellant to establish inadequacy of existing services, not within the purview of 49 U.S.C. 309(b), was an arbitrary, discriminatory, and unlawful additional burden placed upon appellant, and denies appellant due process of law?

F. Whether the Commission erred, acted arbitrarily, capriciously, unlawfully, and contrary to the evidence in adopting the Review Board Number 3's implied finding that a denial of authority "would have no apparent adverse effect (sic) on them ('shippers') in that said Board implied a non-existent finding and the Commission's final Decision was based upon evidence relating to more than one shipper?

G. Whether the Commission erred, acted arbitrarily, capriciously, and contrary to law in manifesting a special solicitude for some of the 49 U.S.C. 309(b) tests to the exclusion of the test evidencing "the changing character of the shipper's requirements"?

H. Whether 49 U.S.C. Sections 303(a)(15) and 309(b), when construed and applied by the Commission and adopted by the three-judge Court below, denied appellant substantive due process in violation of the Fifth Amendment of the Constitution of the United States in that appellant was denied the grant of authority sought.

Statement of the Case.

Background.

By its original permanent authority application filed December 19, 1966, appellant, a California corporation, seeks a Permit authorizing operations as a contract carrier, serving three supporting shippers, from named points in seven specific Midwestern States to points and places in California, over irregular routes, transporting meat, meat products and meat by-products and articles distributed by packing houses. On March 14, 1967, appellant was granted temporary authority to perform the operations sought by it in its Permanent Authority Application, *supra.*

At hearings on the permanent authority application one shipper was eliminated and on December 14, 1967, the Interstate Commerce Commission Hearing Examiner recommended denial of the aforesaid Application (Appendix B hereof). On April 18, 1968, Review Board Number 3 by Dando (a short form decisional technique) affirmed the Hearing Examiner's Report and Order, adding a finding to the effect that there would be no adverse effect upon the supporting shippers. The second of the three supporting shippers was thereafter eliminated by Petition for Reconsideration filed by appellant (*T. R. pp. 92-3) and, on July 29, 1968, Division 1 of the Interstate Commerce Commission, acting as an Appellate Division by said Dando method, affirmed the April 19, 1968 Review Board Number 3's affirmation of the Examiner's Report and Order.

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*Indicates the pages at which the particular referenced fact appears in the Transmitted Record upon appeal from the United States District Court, Central District of California to the United States Supreme Court.

Summary of Complaint.

On December 3, 1968, appellant filed a complaint in the District Court below seeking to suspend, enjoin, annul and set aside the decisions and orders of the Interstate Commerce Commission (Appendices C and D). A temporary restraining order was issued on said date.

By said complaint, appellant contends the decisions and orders are:

(a) Contrary to law, in violation of constitutional right and without observance of substantive due process as required by law;

(b) Arbitrary, capricious, without rational basis, and abuse of Commission discretion; and

(c) Unsupported by any substantial evidence.

In support of the foregoing, appellant contends:

1. Although 49 U.S.C. 309(b) criteria are applicable to contract carrier applications, the quantum of proof under the five criteria varies depending upon the type of contract carriage as defined in 49 U.S.C. 303(a)(15)(a) or 303(a)(15)(b);

2. The Commission required all five 49 U.S.C. 303 (b) criteria be met for *each* shipper prior to grant of authority.

3. The decisions failed to consider the first criteria of 49 U.S.C. 309(b) save as to the characterization of the applicant in the light of 49 U.S.C. 303(a)(15);

4. The dual requirement of establishing uniqueness of service and proof of inadequacy of existing services was an impermissible burden placed upon appellant;

5. The Commission presumption that a grant of authority *could* have an adverse effect upon existing services is erroneous in law and in fact;

6. The decisions, in effect, ignore the effect on the shipper and/or the applicant (appellant); and

7. The decisions failed to recognize the continuing changes in the shipper's business operations.

In the light of the foregoing, appellant asserts that the Commission incorrectly concluded that the grant of authority sought would not be consistent with the public interest and the national transportation policy as declared in the Act (Appendix E).

The appellees assert that the Commission in fact did correctly conclude that the grant of authority would not be consistent with the public interest and the national transportation policy alleging: (1) the Commission correctly applied the statute; and (2) the Commission correctly applied the five criteria of 49 U.S.C. 309(b).

Proceedings in the District Court.

The matter in the District Court below was exhaustively briefed (Appellant's Brief—T. R. p. 233, *et seq.*; Appellees' Briefs, T. R. p. 326, *et seq.* and 364, *et seq.*; Reply Brief of Appellant, T. R. 396, *et seq.*). On April 28, 1969, the matter was orally argued before the three-judge District Court, and thereafter, on May 12, 1969, the District Court issued its Order (Appendix A) affirming the Commission's decision and ordered dismissal of Appellant's Complaint to set aside said Commission decision denying applicant's Application for a Contract Carrier Permit.

Summary of Findings of Fact and Conclusions of Law by the District Court.

By adoption of the Findings of Fact of the Commission, the Court below found:

1. Regarding the nature of the service proposed, that applicant (plaintiff below) failed to establish that there was anything distinct or specialized about the service that differs essentially from that offered by existing common carrier protestants (intervening defendants below), or that applicant is better able to meet the shippers' transportation requirements than are protestants;

2. The shippers have failed to establish that protestants are unable or unwilling to provide such services;

3. Neither shipper has shown any particular familiarity with the services afforded by existing carriers;

4. The record fails to show that these shippers have any distinct needs which can better be met by applicant than by the protestants;

5. A grant of the application could adversely affect the operations of existing carriers;

6. A denial of the application would have no apparent adverse effect upon applicant;

7. There is no evidence regarding any significant change in the character of either shipper's requirements that protestants would be unable or unwilling to meet.

The Court below further found, as to the plurality of shippers, that the Application was considered by the Interstate Commerce Commission Review Board No. 3

as "a request to serve only one shipper" and, further, that applicant was a contract carrier by virtue of motor vehicles exclusively assigned to the shipper pursuant to 49 U.S.C. 303(a) (15)(a). (Appendix A, p. 4).

Finally, the Court concluded that the decision of the Commission determining that the grant of authority sought would not be consistent with the public interest and the National Transportation Policy was based upon adequate findings within the special expertise of the Board and the Commission and the same were based upon substantial evidence and in accordance with applicable law, citing no cases in support of the Order. (Appendix A, p. 2).

Substantiality of Federal Questions.

This appeal, involving the actions of the Interstate Commerce Commission, presents issues of crucial importance, particularly to small truckers and shippers, whose ability to compete with established large common carriers and integrated carrier-shippers may be impaired by the Commission's unlawful, uncertain and selective application of the Interstate Commerce Act and particularly Sections 203(a)(15) and 209(b) thereof (49 U.S.C. 303(a)(15) and 309(b)), without effective judicial supervision and control.

The questions raised in this case are extremely vital due process questions affecting property rights of the small carrier or "would be" carrier. For, if the improper construction, discriminatory and non-uniform application of the law, exemplified by the Interstate Commerce Commission in the instant proceeding, and affirmed by the three-judge District Court below, is not ruled unlawful and violative of the due process

rights of the said contract carrier applicant, it means that in any exclusive and continuing use of equipment application proceeding applicant must veritably establish not only that the service is unique, distinctive and of a type and character separate and apart from that of the protestant highway common carrier, but also that said carriers are unwilling or unable to perform the proposed service.

Plenary consideration is necessary for these reasons:

1. This appeal presents to this Court for the first time the full and complete determination of the construction and application of 49 U.S.C. 309(b) in contract carrier applications filed pursuant to the alternative definitions contained in 49 U.S.C. 303(a)(15)(a) or (b). Reference to said section notes the disjunctive use of the words in (a) "continuing period of time to the exclusive use" and in (b) "services designed to meet the distinct need of each individual customer".

The term, "distinct need" in Section 303(a)(15) is not the same as the criteria set forth in Section 309(b), nor may the "distinct need" in 303(a)(15) be properly used interchangeably with the determination to be made under 309(b) pursuant to the prescribed criteria therein contained. *Mid-West Truck Lines, Ltd. v. U.S., et al.* (1967), 269 F. Supp. 554; *Meat Packers Express, Inc. v. U.S., et al.* (1965), 244 F. Supp. 642. The case of *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 14 Fed. Carr. Cases 81,409, sets forth, with considerable degree of thoroughness, the construction and application of the Section 309(b) criteria to contract carrier applications filed under Section 303(a)-(15)(*b*), including the aspects of need for service vs.

adequacy of existing services; burden of proof; distinct need for service; and shipper's requirements, but fails to distinguish the extent, degree or intensity in the application of the said Section 309(b) five criteria to a request for contract carrier permit filed pursuant to Section 303(a)(15)(*a*). The Commission's and the Board's adoption of the examiner's Report and Order (Appendix B) and the District Court's adoption of the Commission decision in the instant case evinces the fact that the hearing examiner required a showing of distinct need (*i.e.*, meaning unique, singular different from the ordinary and not met by protestants), not for the purpose of meeting the requirements of the alternative 303(a)(15) definitions, but with reference to the requirements of Section 309(b), the second factor thereof, namely "the nature of the service proposed".

The Commission, and by adoption, the District Court below, erred in requiring that *each* of the five criteria of Section 309(b) be met for each shipper prior to grant of authority. Said Section permits issuance of a permit to any qualified applicant authorizing "in whole or in part" the operations covered by the application if the applicant is fit, willing and able and the proposed operation is consistent with the public interest and the National Transportation Policy declared in the Act. The District Court below found that the Board Decision and Order (Appendix C) considered the application under a request by appellant to serve "only one shipper" (Appendix A, p. 1). Reference to said Decision and Order reflects consideration as to *"more than one shipper"* in its first finding paragraph (Appendix C. p. 35).

The most significant criteria appertaining to a continuing period exclusive use applicant (appellant here) is the first factor or test of Section 309(b), "the number of shippers to be served". The District Court below, the Commission, and the Board disregarded said factor. Interstate Commerce Commission case precedent has established that the first criterion "means that the applicant's case is stronger or weaker in proportion to the number of its contracting shippers". *In William P. Bursch Extension-Lumber* (1963), 91 M.C.C. 953, 15 Fed. Carr. Cases 35,569. Where there is but one shipper the Commission has opined "It would be impossible to make any stronger showing under the test involved". *Meat Packers Express, Inc.—Extension—Dennison*, 100 M.C.C. 401 (on remand) 1966 Fed. Carr. Cases 35,978.

2. This appeal presents the question whether 49 U.S.C. 309(b) as construed and applied, is repugnant to the due process clause of the Fifth Amendment to the U.S. Constitution. Further, although there is no "equal protection clause" applicable to the Federal Government (*LaBelle Iron Works v. United States* (1921), 256 U.S. 377, 41 S. Ct. 528, 65 L. Ed. 998), the Federal Constitution does require *uniformity* in certain instances, *e.g.*, in the imposition of indirect taxes (Art. I, Section 8); and it has been declared that *discrimination* may be so arbitrary and injurious as to be deemed a violation of due process. See *Detroit Bank v. United States* (1943), 317 U.S. 329, 63 S. Ct. 297, 87 L. Ed. 304; *Bolling v. Sharpe* (1954), 347 U.S. 497, 74 S. Ct. 693, 694; *Schneider v. Rusk* (1964), 377 U.S. 163, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218. Appellant submits that the construction and application of the statutes

as set forth in the Questions Presented, *supra*, and as herein supported, were so construed and applied without any regard for the practicalities or peculiarities of either the individual application case or the kind of application cases which arise before the Interstate Commerce Commission.

The question affects the proper processing of all contract carrier applications before the Interstate Commerce Commission and the determination of the proper tests applicable to the alternative type contract carrier applicants is vital to the preservation of the right of substantive due process as required by the Constitution.

The Commission and the District Court below, by adoption of the Commission decision, in compelling appellant to establish inadequacy of existing services, as well as proof of service of a type not performed by common carriage was an arbitrary, discriminatory and unlawful additional burden placed upon applicant and denied applicant due process of law. To require appellant to prove it could assign vehicles *more satisfactorily* than protesting common carriers is imposing an "impossible burden of proof" upon appellant. *Moyer Contract Carrier Application*, 88 M.C.C. 767. Section 309 (b) and the Supreme Court's opinion in the *I-T Transport Company* case do *not* require applicant to prove *each* of the five criteria by a preponderance of the evidence. Rather, the evidence must be weighed against all five criteria as a group and if, in the weighing, the scales tip in favor of the applicant, the application must be granted. For contract carriers who propose to assign equipment for a continuing period of time to the exclusive use of a shipper, as distinguished from those who propose to render a distinctive or

specialized service, the burden of proof imposed by the Commission and the District Court below can be met only by showing the untried services of protesting carriers to be inadequate. In the *J-T* case the Supreme Court held that a presumption as to the adequacy of existing services was not justified and in addition the Court indicated that the adequacy of the services of protesting carriers, where such carriers do not enjoy the traffic (as here), would be a determinative factor under the provisions of Section 309(b) "only in the unusual case" (308 U.S. 81 at 93). The effect of the Commission decision is to make adequacy of existing service a conclusive ground for denying the applications of all carriers who propose to serve one shipper or a limited number of shippers by assigning vehicles to his (their) exclusive use for continuing periods of time.

3. The Commission and the District Court erred in adopting the following procedural burden of proof for resolving the contrary implications of two 309(b) tests: (1) "the nature of the service proposed"; and (2) "the effect which granting the permit would have upon the services of protesting carriers", as follows:

> "The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show that they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants." (308 U.S. 81 at 90).

The procedure outlined above is inappropriate where the applicant does not necessarily propose a service which is specialized and tailored to a shipper's distinct need. In its literal application of the above-quoted language of the Court, the Commission and the District Court below imposes a burden of proof which, in effect, repeals the Subsection (a) of Section 303(a)(15)(a) except for applicants who prove that existing carriers are unable or unwilling to handle the traffic involved. The exception is contrary to the Supreme Court's opinion that the Commission "should not manifest special solicitude for that criterion which directs attention to the situation of protesting carriers" (*J-T* case, 368 U.S. at 89). Further, the fact, not considered by the District Court below nor the Commission, that the protesting carriers are not now transporting the traffic involved and will not get it whether the application is granted or denied, is a highly relevant factor.

4. The Commission and the District Court below, and adoption, erred in manifesting a "special solicitude for that criterion which directs attention to the situation of protesting carriers, at the expense of that which directs attention to the situation of supporting shippers, when those criteria have contrary implications." *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 at 89. The commission decision ignored the fourth criterion—"the effect which denying the permit would have upon the applicant or its shipper" (emphasis added) in that Review Board No. 3's implied finding that a denial of authority "will have no apparent adverse

effect up the shippers" (Appendix C, p. 35) obviously refers to *more than one* shipper and is based upon a non-existent finding in the hearing examiner's Report and Order (Appendix B). Add to that the finding by said examiner that shipper Hoffman (the ultimate sole supporting shipper) "will, however, engage fully in private carriage if such authority is not granted" evinces a complete disregard of application or consideration of the fourth criterion under Section 309(b).

5. Finally, the Commission and the District Court below, by adoption of the Commission decision, erred in failing to properly apply the fifth factor of Section 309 (b), "the changing character of that shipper's requirements" other than to find, without supporting evidence, "there is no evidence regarding any significant change in the character of either shipper's requirement that the *protestants would be unable or unwilling to meet*" (emphasis added) (Appendix B, p. 32).

Absent a single citation of authority to support the reasoning of the District Court below, the Commission's decision, the Review Board No. 3's decision and order and the Examiner's report and order, appellant submits that the Commission did not properly employ the statutes nor appropriately evaluate the requisite criteria, made findings not supported by substantial evidence; and the denial of the authority sought prevented substantive due process afforded appellant in violation of the Fifth Amendment of the Constitution. Whether the due process clause of the Fifth Amendment tolerates

such arbitrary capricious, unlawful and discriminatory agency action, unchecked by meaningful judicial review, is a substantial issue deserving review by this Court.

Conclusion.

Probate jurisdiction of this appeal should be noted.

Respectfully submitted,

SAMUEL B. PICONE,
HARRY ROSS,
DONALD MURCHISON,
Attorneys for Appellant.

EXHIBIT A.

Order.

United States District Court, Central District of California.

Transportation Unlimited of California, Inc., Plaintiff, vs. United States of America and Interstate Commerce Commission, Defendants. Civil No. 68-1987-S.

Filed May 12, 1969.

Plaintiff filed an action under 28 U.S.C. §§ 2284 and 2321-2325 to set aside a decision and order of the Interstate Commerce Commission Review Board No. 3, decided on April 18, 1968, denying plaintiff's application for a contract carrier permit. Plaintiff's original petition requested a permit to serve more than one shipper, but before the final decision, the application had been restricted to a request to serve only one shipper. It was considered by the Board in this posture.

It was determined that plaintiff proposed to operate as a contract carrier in view of the fact that motor vehicles were exclusively assigned to the shipper. This is a proper determination pursuant to the provisions of 49 U.S.C. § 303(a)(15)(a). The Board then turned to the provisions of 49 U.S.C. 309(b) to determine whether the issuance of the requested permit would be consistent with the public interest and the national transportation policy.

The considerations of public interest and national transportation policy are many and varied and within the special expertise of the Board and the Commission. While the findings and opinion of the examiner might have been more explicitly stated, or the Board

or the Commission in adopting it might have added some clarification, its meaning is abundantly clear when it is viewed as a whole and no error is apparent.

The decision of the Commission that granting the application would not be consistent with the public interest and national transportation policy was based upon adequate findings based upon substantial evidence and in accordance with applicable law. This decision and the refusal to grant a further hearing was a rational exercise of administrative discretion.

IT IS ORDERED that the Findings of Fact of the Commission are adopted by this Court and the decision of the Commission is affirmed and the complaint is dismissed.

DATED: May ..... 1969.

M. Oliver Koelsch
U. S. Circuit Judge

Albert Lee Stephens, Jr.
U. S. District Judge

E. Avery Crary
U. S. District Judge

EXHIBIT B.

INTERSTATE COMMERCE COMMISSION

Served December 14, 1967

Notice to the Parties.

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., CONTRACT CARRIER APPLICATION

Decided .....

Application seeking a permit authorizing operations as a contract carrier, denied.

Harry Ross for applicant.

Ralph W. Pulley, Jr., Donald L. Stern, John M. Records, Edward G. Bazelon, and *Arnold L. Burke* for protestants.

REPORT AND ORDER RECOMMENDED BY JAMES A. McKIEL, HEARING EXAMINER

By application filed December 19, 1966, Transportation Unlimited of California, Inc., of Beverly Hills, Calif., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of meat, meat products, meat byproducts and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, from points in Iowa and from York, Dakota City, Omaha, Fremont, and Scottsbluff, Nebr., Huron, Sioux Falls, Watertown, Madison and Mitchell, S. Dak., Wichita, Hutchinson, and Kansas City, Kans., Chicago and Momence, Ill., St. Paul, Minneapolis, Austin, Albert Lea, and Worthington, Minn., and Madison, Milwaukee, and Eau Claire, Wis., to points in California, under contract with Hoffman Brothers Packing Company, Inc., and Wilsey Bennett Company, hereinafter called Hoffman and Bennett, respectively.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 5 and 6, 1967, at Los Angeles, Calif., and on July 11, 1967 at Washington, D. C. The application is opposed by Frozen Food Express, Watson-Wilson Transportation System, Inc., Little Audrey's Transportation Co., Inc., Midwest Emery Freight System, Inc., Midwest Coast Transport, Inc., Ringsby Truck Lines, Inc., W. J. Digby, Inc., W. J. Digby, Inc. of Iowa, Curtis, Inc., and Refrigerated

Foods, Inc. Vitalis Truck Line presented evidence in support of the protest of W. J. Digby of Iowa.

Applicant holds 180-day temporary authority issued May 10, 1967, to perform the operation proposed herein. It was formed in October 1966 and until obtaining the temporary authority was engaged principally in repairing and maintaining motor vehicle equipment and in the sale of tires and other vehicle replacement parts. At the time of the initial hearings in June 1967 it had handled 10 shipments under its temporary authority, of which 5 moved to Hoffman or its customers in the Los Angeles area and one moved to Bennett's customers in the San Francisco area.

Applicant's president, Stephen Levinson, for two years until January 1967 was president of California Marketing Cooperative, Inc., hereinafter called the Co-Op, when the latter was transporting shipments for Hoffman, Bennett, and others. Levinson's father is president of Hoffman. For about 12 years prior to the organization of the Co-Op Levinson was employed by Hoffman. Levinson is also president and sole stockholder of Tempo Leasing, Inc., which sub-leases to applicant five tractor-trailer units which are leased from Levinson. These vehicles were formerly under lease to Hoffman. They are now used only in the service of Hoffman on movements from midwestern points to California; however, they are used in transporting exempt commodities, principally produce, for other shippers in the reverse direction. Admittedly, an eastbound movement of such commodities is essential to the economic feasibility of the entire operation proposed. Applicant also operates four units which are owner-operated and which are dedicated to serving Bennett from

the midwest to California. All of the tractors have sleeper cabs and trailers are insulated, have extruded floors, and are equipped with meat rails and mechanical refrigeration units capable of maintaining temperatures at any point between zero and 70 degrees. Portable dividers are available to permit shipping of mixed loads of frozen and unfrozen commodities. At shippers' request, these vehicles are painted so as to advertise the respective company's products. The drivers of the above vehicles are paid on a combination of trip and mileage basis. Levinson also owns 30 tractors and 35 trailers which are leased to Hoffman, but which will be made available to applicant under long-term lease should "it find it necessary to increase the size of its fleet." Prior to leasing these vehicles to Hoffman 11 of the units were leased to the Co-Op. Since November 1966 applicant has maintained a terminal facility in Council Bluffs, Iowa, equipped for complete maintenance of all vehicles to be used in this operation. All equipment will regularly be routed through this terminal for systematic maintenance and inspection. When temporary authority operations were commenced it established a terminal and office facility in Vernon, Calif., next door to Hoffman's plant. At the time of the initial hearings herein, it was looking for a facility in the San Francisco area for serving Bennett.

At the hearing applicant's president had freight bills evidencing 7 shipments of meat for Hoffman between May 23 and June 3 and 5 shipments of produce. All of the meat shipments were truckloads and originated at a single point and were destined to Los Angeles. Several of these shipments moved in vehicles which have been designated as for the exclusive use of Bennett.

which was said to have resulted from the confusion of getting the operation started. Origins of the meat shipments were Harlan, Iowa Falls, and Sioux City, Iowa. Applicant is said to be "working to develop methods that will make shipping documents available immediately after delivery of the product to customers of our shippers and even though the shipment may not have yet reached the point where final unloading will occur"; however, such system has not yet been put into effect.

Applicant's balance sheet as of March 31, 1967 shows current assets of $15,522 and current liabilities of $5,828. For the first 3 months of 1967 it had a net profit of $2,753. Since the date of the balance sheet it has negotiated a bank loan of $25,000, which was arranged to assure availability of such funds as might be necessary to conduct these operations.

Wilsey Bennett Company purchases meat and meat products from packers in the Midwest and sells them to customers in California. All of the meat purchased is pork and pork products except for some carcass beef which is purchased "when the market is right." Although it has purchased as all of the points sought by this application, at the present time and for the foreseeable future its purchases are and will be predominantly in Iowa. From Fort Dodge it has received from 10 to 15 shipments during the past 6 months. Eight and Midwest Coast have been used although, during the past 2 or 3 months greater reliance has been placed on piggyback. From Cherokee it receives about one shipment a month which has been moving piggyback and by the Co-Op. Shipments from Storm Lake have been cut back to about 2 a month, transportation being

by Digby and Midwest Coast. Heretofore it has received 1 or 2 shipments a week from Waterloo primarily by piggyback; however, the supplier at that point is closing its plant. Nothing has been received from Dubuque in over a year and the witness did not know what service is available from that point. About one shipment a month is received from Cedar Rapids moving primarily by piggyback. Shipments from Ottumwa are sporadic and amount to no more than one every 6 weeks on the average. Piggyback is used on about 70 percent of those shipments and, although the witness did not remember the carriers used on the balance of that traffic, he knows that Digby and Little Audrey's are available. One shipment a week has been received from Perry, moving by Digby and a cooperative. Shipments from Des Moines amount to about 1 or 2 a week and have moved by Digby, Midwest Coast, and a cooperative. Very little is received from Wichita and nothing from Emporia or Hutchinson. From Kansas City it receive about 3 shipments during the 6 weeks prior to the hearing. From Scottsbluff only an occasional shipment is received, and none in over a year. Nothing has been received from Omaha in 6 months, and very little from York. From Fremont about 1 shipment in 3 months is received. From Chicago it receives 1 or 2 shipments a month, mostly by rail and piggyback. From the 5 Minnesota points involved it receives a total of about 1 shipment every 3 months. Nothing is received from Wisconsin. From 4 to 5 shipments a week are received from Sioux Falls by Digby, Midwest Coast, and a cooperative. Some traffic is received from Huron, although there is no regular movement. The average volume of these shipments is from 800

000 to 1,000,000 pounds per week, approximately 25 percent of which moves by rail and piggyback, 25 percent by motor common carrier, and the balance by a cooperative (Milk Producers Cooperative). However, during the period from May through part of August there is a heavy seasonal movement of frozen products which move about 40 percent by piggyback. It is estimated that Bennett would tender applicant a volume that would require up to 10 vehicles a week. No change in the volume of movement by rail or motor common carrier is anticipated if this application is granted, the traffic going to applicant being that previously handled by Milk Producers Cooperative. Its average truck shipment is 40,000 pounds. It has shipped to customers in the Los Angeles area and to San Francisco, Oakland, Richmond, San Leandro, San Jose, Modesto, Stockton, and Bakersfield, all of which are in the San Francisco area except Bakersfield. Shipper's customers frequently operate on short inventories and depend on it to effect delivery of their products at the time scheduled. Examples of the type of service expected are fourth morning delivery from Chicago and 48 to 52 hour delivery from Omaha. Many of its customers' orders are for less-truckload quantities and such shipments involve multiple pickup and delivery. Shipper also expressed a desire to place advertising on the vehicles used to deliver its products to customers; however, it does not have such advertising on its own equipment nor did it on the vehicles of the Co-Op when the latter was operated by Levinson. The services of existing motor common carriers are said to have been unsatisfactory in several respects, although no specific instances of service deficiencies were cited. Such car-

riers are frequently unable to provide equipment for loading at the points desired and they are often unable to serve all of the origin and destination combinations needed in forming truckload shipments. It also has found it impossible to obtain from these carriers copies of delivery receipts and other shipping documents necessary to collect from its customers immediately after delivery has been made. Although at the time of the initial hearings applicant had handled only one shipment under temporary authority (on June 2, from Des Moines to several points in the San Francisco area), shipper indicated that it is the type of service which it requires.

Hoffman Brothers Packing Company, Inc., purchases from 1,200,000 to 1,700,000 pounds a week of meat and meat products, including carcass meat and primal cuts, from so-called primary producers in the mid western States for sale to chain stores, jobbers, wholesale organizations, governmental installations, and various kinds of institutions located principally in California. Carcass meats are processed at its Los Angeles plant and inbound shipments must be coordinated with plant operations so as to prevent work stoppages and consequent overtime labor expenses. Its plant uses considerably more pork than beef and it has been a long time since it has received carcass beef from the mid west. It has in the past received shipments from Perry, Sioux City, Harlan, Dennison, Marshalltown, Iowa Falls, and Glenwood, Iowa, York, Dakota City, and Omaha, Nebr., Watertown, S. Dak., Wichita and Kansas City, Kans., Chicago, Ill., and Albert Lea and Worthington, Minn. Daily shipments are received from Sioux City, and Harlan, all at the Los Angeles plant

From Dennison it receives 2 to 3 shipments a week moving to Los Angeles, San Francisco and Red Bluff. The suppliers' plants at Glenwood and Marshalltown were closed down in 1967. About one shipment of carcass hogs a month is received from Iowa Falls and during the past 6 months it has received 1 shipment (in 1967) from Perry. From York about 2 shipments a week are received at the Los Angeles plant. Movements from Dakota City and Omaha are irregular and infrequent. Nothing has been received from Wichita in about 3 years or from Kansas City in over a year. From Chicago regular shipments of fresh meat cuts are received at Los Angeles. Nothing in recent years has been received from Worthington or from Albert Lea in approximately 18 months. The supplier at Watertown closed about 2 months prior to the initial hearings herein. At the present time shipments from Iowa, which are primarily from Sioux City, Harlan and Dennison, move by piggyback, by applicant, and in shipper's own vehicles. No investigation has been made of the available motor common carrier services from any of the States involved. The Chicago supplier selects the carrier and the witness did not know if applicant's service would be used from this point. Until recently practically all of this traffic moved directly to the Los Angeles plant where it was processed and distributed to customers; however, some shipments of pre-cut meat items have been moving from Dennison direct to customers in Los Angeles, San Francisco and Redding or Redwood, Calif., and it is seeking additional customers at other points where the same type of service could be provided. At the time of the initial hearings it was in the process of establishing storage facilities for cooling

and freezing in the San Francisco area. Once it is established a considerable amount of the traffic to that area will be stored at that point and orders subsequently made up therefrom. Some large orders will be delivered direct to customers and some partial loads will be transferred at San Francisco to smaller trucks for delivery to customers. It is also anticipated that some shipments will make split delivery to the San Francisco and Los Angeles facilities. Although the shipper witness was unable to designate any specific instances of service failures on the part of existing motor common carriers, the shipper is said to have been "singularly unsuccessful in our efforts to obtain service from motor common carriers that could be coordinated with the operations of our plant because product did not arrive at the time scheduled and we were unable to obtain advance information concerning the carriers inability to effect scheduled delivery." Attempts to use rail service, including piggyback service, proved unsatisfactory because of the inability to coordinate the transportation service with the plant operations. Its use of the Co-Op also proved unsatisfactory, though superior to that otherwise available, and when it terminated its transportation activities applicant was requested to seek appropriate authority to provide the service. Between the time the Co-Op ceased operations on January 1, 1967, and applicant obtained temporary authority, shipper began private carriage operations but the extent of those operations has been reduced on the strength of the service performed by applicant. The latter has been an adequate and effective substitute for private carriage and shipper will terminate all private carriage if the applicant is granted the authority

sought. It will, however, engage fully in private carriage if such authority is not granted.

Frozen Food Express, Inc., holds motor common carrier authority to transport (1) meat, meat products, and meat byproducts as defined in parts A and B of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, from Council Bluffs (which includes Omaha), Dubuque, and Ottumwa, Iowa, and Wichita, Kans., to points in California, (2) frozen meats, from the storage facilities utilized by Armour & Company at or near Worthington, Minn., to points in Texas, restricted to shipments originating at said storage facilities at or near Worthington, (3) frozen foods, from points in Minnesota to points in Texas, (4) meats, meat products, and meat byproducts, and articles distributed by meat packinghouses, as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, *supra*, from the plant site of Armour & Company near Worthington, Minn., to points in Texas, restricted to shipments originating at the plant site of Armour & Company near Worthington, (5) meats, meat products, meat byproducts, and articles distributed by meat packinghouses, as described in Appendix I to the report in *Descriptions in Motor Carrier Certificates*, *supra*, from Cudahy and Milwaukee, Wis., to points in Texas, (6) frozen foods and fresh meats from points in Iowa, Kansas and Nebraska to points in Texas, (7) meats, meat products, and meat byproducts, (a) from Wichita, Kans., to points in Texas, and (b) from points in Iowa (except Ottumwa), Nebraska, and Kansas, (except points in the Kansas City commercial zone), to points in Texas, (8) frozen foods, and meats, meat prod-

ucts, and meat byproducts as defined by the Commission from points in Illinois to points in Texas, and (9) meats, meat products, and meat byproducts and frozen foods, all in vehicles equipped with mechanical refrigeration, from points in Texas to points in California. By tacking parts (2) through (8) with part (9) in the Dalhart, Tex., area of the Texas Panhandle, operations are conducted from those origins to points in California. It is now conducting operations from various of the above origins to California and it is considered important traffic. It provides LTL and truckload service from Chicago to California and has handled some shipments from Chicago part of which were consigned to Hoffman. During the past year there has been a considerable decline in meat traffic handled by it from the midwest (Illinois, Iowa, Nebraska, Missouri, and Kansas) to California. In 1965 it handled a total of 912 truckloads of meat from those origins to California and in 1966 it handled 728 such shipments. During the first 5 months of 1967 it handled 270 such shipments. From those origins to California its gross revenue on meat traffic in 1965 was $308,511 and in 1966 was $228,575. An exhibit was submitted showing examples of meat shipments handled by it from and to the points involved from January 1966 through May 1967. Many of those shipments involved split deliveries as well as scheduled time deliveries. If a truck is delayed and will not arrive on time both the shipper and receiver are notified. Multiple pickup and delivery is a common requirement in its service for the meat industry. Protestant maintains its general offices at Dallas, Tex., and it has branch offices at, among other points, St. Louis, Mo., Kansas City, Kans.,

Omaha, Nebr., Chicago, Ill., and Montebello, Calif.; which are connected by leased wire service with its Dallas offices. It also has a wide area telephone service in Texas. By means of this communication set up, coordination and overall control of its operations is maintained at Dallas, although the actual dispatching of equipment is handled by the office nearest to the location of the equipment. It is also able to keep a tight control over the movement of equipment between the different areas of its operation and thereby reduce unnecessary deadheading. It operates 168 tractors (130 leased) and 203 trailers (27 leased). The tractors are all diesel powered and have sleeper cabs. The trailers are all equipped with mechanical refrigeration units which are capable of maintaining controlled temperatures ranging from minus 10 degrees to 70 degrees. It has a number of trailers which are specially designed compartment-wise so that it can maintain temperatures in different compartments at different levels. *Protestant would make special arrangements to supply* delivery receipts shortly after delivery if a shipper or receiver requested it. Its tariff provides for use of placards on vehicles stating the name of the shipper being served. It is not operating at capacity from the midwest to California and would like additional traffic.

Midwest Coast Transport, Inc., holds motor common carrier authority to transport (1) meats, meat products and meat byproducts and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, (a) from points in Iowa and Minnesota to Mitchell, S. Dak., (b) from Mitchell, S. Dak., to points in California, (2) meats, packing

house products, and commodities used by packinghouses as described in Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra,* (a) from Sioux Falls, S. Dak., to points in California, (b) from points in Wisconsin to Sioux Falls, (c) from Fremont, Nebr., to Mitchell, S. Dak., and (d) from Madison, S. Dak., to points in California, (3) general commodities, with the usual exceptions, from Omaha, Nebr., to Council Bluffs, Iowa, and (4) fresh meats and packinghouse products from Sioux City, Iowa, to points in Kansas (except Kansas City, Kans.). Parts (1)(a) and (2)(c) are tacked with part (1)(b) in operating from Iowa, Minnesota and Fremont, Nebr., via Mitchell, S. Dak., to points in California. Parts (3), (1)(a), and (1)(b) are combined or tacked at Council Bluffs, Iowa, and Mitchell, S. Dak., in operating from Omaha to points in California. In handling shipments from Chicago and Momence, Ill., it would interline with originating carriers at Sioux Falls, S. Dak., and transport the shipments to California under part (2)(a). Shipments originating in Wisconsin would be transported by protestant uder part (2)(b) to Sioux Falls and there interlined with All-American Transport, Inc., a commonly controlled carrier, which would transport the shipments from Sioux Falls to Mitchell, S. Dak., and there again interline with protestant for transportation under part (1)(b) from Mitchell to points in California. From Huron and Watertown, S. Dak., shipments would orignate with All-American and be interlined with protestant at Mitchell, S. Dak., for transportation to California under part (1)(b). Any service that protestant could perform from Scottsbluff, Nebr., would be too circuitous. Its main office is at

Sioux Falls, S. Dak., and it has branch offices at Austin and St. Paul, Minn., Omaha, Nebr., Ottumwa, Iowa, Sioux Falls, S. Dak., Schererville, Ind., and San Leandro, Calif., (in the San Francisco area). All of these offices are connected by telephone and teletype. It operates 165 tractors, all of which are diesel powered and equipped with sleeper cabs, and 176 trailers equipped with mechanical refrigeration units capable of maintaining temperatures between zero and 70 degrees. The trailers also have meat rails and have dividers for transporting frozen and unfrozen products at the same time. From January 28, 1966, through May 8, 1967, it transported 42 shipments for Bennett weighing a total of 1,653,705 pounds, for which it received a revenue of $39,994, from points in Iowa, Minnesota and South Dakota to points in California. Six of those shipments were originated by All-American and interlined with protestant for delivery. It has handled no traffic for Hoffman for at least 3 years. Protestant submitted a representative list of shipments of meat and packinghouse products transported by it from Iowa, Minnesota, Nebraska, South Dakota, Wisconsin, and Chicago, Ill., to California during the last four months of 1966, which showed a total volume of 10,104,336 pounds, for which it received a total revenue of $257,360. Many of the shipments reflected in that list involved split deliveries to some points outside California and many involved interline movements. For Bennett it handled 32 shipments in 1964, 13 in 1965, 23 in 1966, and 24 during the first 5 months of 1967. When occasionally requested to do so, it has notified Bennett after the first delivery has been made on a shipment.

income, San Jose, and San Francisco, Calif., Chicago, Ill., Kansas City, Mo., Omaha, and Scottsbluff, Nebr., Denver, Colo., and Salt Lake City, Utah. Protestant submitted a list of representative shipments of packinghouse products transported by it from the consignees to California points between July and December 1960. A substantial number of these shipments involved interline with Midwest Coast and two carriers not parties hereto and many involved split delivery service to four destinations. From January 27 to June 9, 1961, it transported 12 shipments of electric motors weighing 14,850 pounds for Bennett from Los Angeles to western and midwestern destinations. From January through April 1961 it transported 17 shipments of smoked meats and sheet bacon weighing 23,800 pounds for Hormel from Los Angeles to Salt Lake City. No complaints were received from either shipper. It admits both shippers regularly from the midwest to California but is handling no such traffic at the time. It provides 4-split delivery service and scheduled deliveries. Kingsley Pacific, Limited, is owned and operated by the same Kingsley owner and its four carriers have joint interline and interchange of equipment agreements and engage in joint solicitation efforts including through service by their Kingsley Pacific operating terminals in California between San Diego and San Francisco, serving numerous intermediate points. Pacific originates for Kingsley and delivers to a point or points served by Kingsley Pacific is interchanged in California and the equipment and drivers move on through to destination.

W. J. Digby, Inc., of Texas holds motor contract carrier authority to transport, inter alia, meats, packinghouse

tion arrangements with several carriers not parties hereto. It operates 20 tractors with sleeper cabs, and 28 trailers, the latter being 45 feet long and equipped with meat rails and with mechanically refrigerated units. Terminals are maintained at Salt Lake City, Storm Lake, and Los Angeles. Digby submitted a list of meat shipments handled by it during December 1966 and the first 8 months of 1967 from origins involved to points in California. Many of those shipments involved interlining at origin and or destination, including shipments originating at Chicago and interlined at Dubuque for delivery by protestant in California without a stop in transit. For Bennett it handled 42 loads from the origin area sought to California in 1966 and 44 loads during the first 10 months of 1967. Approximately 3 months prior to the hearing in July Bennett discontinued using Digby allegedly because of rates. Prior thereto it served Bennett on a substantial scale without complaint. Delivery receipts were mailed to that shipper after each delivery. Digby's predecessor transported 501 loads for Hartman in 1963. In 1965 Digby handled 2 loads for Hartman, and none in 1966 or during the first 8 months of 1967. The 1964 loads originated at Denison, Hayfield, Iowa Falls, and Sioux City, Iowa. When it purchased the stock of its predecessor in January 1965 Digby's representatives checked the records of that carrier and in February 1965 submitted to Hartman a bill for undercharges on traffic handled in 1964 in the amount of approximately $38,000. Since that time it has been tendered no traffic by Hartman. It has tariff provisions for placarding vehicles with shipper's name and provides scheduled deliveries when desired. The considered traffic from the midwest to the West Coast is the heart of its operation. It has

experienced severe competition from the cooperatives, piggyback service, and the institution of a contract carrier service. It now has about 25 vehicles a week in this area and desires to handle all of the traffic that would be tendered to it. It has had to lease some of its vehicles to other carriers from Iowa and Nebraska to southern and eastern points not served by it.

Vitalis Truck Line holds authority to transport such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, and in connection therewith, materials, equipment and supplies used in the conduct of such business, between Fremont and Omaha, Nebr., and points in Iowa, restricted to shipments moving from, to, or between warehouses, and wholesale, retail, or chain outlets of grocery and food business houses. In addition to the foregoing authority, the parties stipulated that Vitalis is a party to the interline arrangement hereinbefore referred to in connection with W. J. Digby of Iowa.

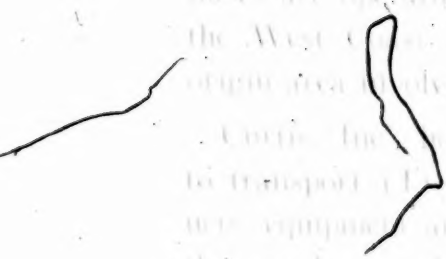
Midwest Luxury Freight System, Inc., holds motor common carrier authority, as pertinent here, to transport (1) foodstuffs, raw and manufactured, between points in Illinois, (2) general commodities, over specified regular routes from Chicago to Rock Island, Ill., (which includes Davenport, Iowa), (3) such merchandise as is dealt in by wholesale food business houses, and in connection therewith equipment, materials and supplies used in the conduct of such business from points in Wisconsin to Chicago, and (4) general commodities, with the usual exceptions, over described regular routes between Chicago and St. Paul, serving Eau Claire, Wis., among other points. It has terminals at a number of points, including Austin and St. Paul,

Minn., Cedar Rapids, Council Bluffs, Davenport and Perry, Iowa, Chicago, Streator, and Waukegan, Ill., Kansas City, Kans., and McFarland, Wis.

Uhlk Andrew Transportation Company, Inc., is controlled by Midwest Livery and holds authority, as pertinent here, to transport (1) meats, meat products, and meat byproducts as defined in Section A of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, (a) from Chicago, Mason City, and Sioux City, Iowa, Kansas City, Kans., St. Paul, Minn., Omaha, Nebr., and Huron, S. Dak., to points in California, and (b) from Madison, Wis., Austin, Minn., and Davenport, Waterloo, Fort Dodge, Estherville, and Storm Lake, Iowa, to San Diego, Los Angeles, San Jose, San Francisco, Stockton, and Sacramento, Calif., (2) meats, meat products, and meat byproducts, and articles distributed by meat packinghouses, as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, from Des Moines, Iowa, to points in California, (3) the commodities classified as meats, meat products, and meat byproducts, and articles distributed by meat packinghouses, as described in Sections A and C of the Appendix to the report in [illegible] from Topeka, Kans., to Los Angeles, Oakland, and Ducor, and San Francisco, Calif., and (4) general commodities, with certain exceptions, not relevant here, over irregular routes between Omaha and Fremont, Nebr., Fremont, as served by tacking (1) and (2) above, and (3) the high-angle route between Fremont, Nebr., as served by interlining with Midwest Livery at Chicago, Ill., Davenport, and Mitchellville, Iowa, Wisconsin points can be served by interlining with

Midwest Emery at Chicago. Eau Claire is served by interlining with Midwest Emery at St. Paul. The following points are served by interlining with other carriers not parties hereto: Madison, Sioux Falls, Watertown, and Mitchell, S. Dak., by interlining at Huron, S. Dak.; Wichita and Hutchinson, Kans., by interlining at Topeka or Kansas City; Albert Lea by interlining at Storm Lake, Iowa; and Worthington by interlining at Sioux City. It operates under long-term lease 150 tractors and 127 insulated trailers equipped with mechanical refrigeration units capable of maintaining temperatures from sub-zero to 70 degrees. Terminals are maintained at Fremont, Nebr., Chicago, St. Paul, Council Bluffs, Iowa, Kansas City, Kans., San Francisco and Norwalk, Calif., Seattle, Wash., and Salt Lake City. It also has a number of check points in Iowa, South Dakota, Nebraska, Nevada, Wyoming, New Mexico, Arizona, California, Montana, Washington, and Idaho, where drivers are required to record the time of their stop sheets. If shippers or receivers so desire, they will be advised daily or more often of the progress of their shipments. It can provide shippers with delivery receipts, a copy being mailed to the driver or brought to the terminal for mailing; however, the practice is not required by many customers. Most receivers specify the time they expect deliveries and no time guarantee had 99 percent compliance with time deliveries. It provides pick-up and delivery service and will station equipment at a production point if there is sufficient traffic to be available to warrant it. Its vehicles will be placarded with shippers name if desired. Under any of the original 3 lists of representative shipments handled by it from intrastate origins (Iowa, Nebraska, South Da-

kota, Kansas, Illinois, Minnesota and Wisconsin) to California during the first 5 months of 1967. Included in that list are interline shipments and split pickup and delivery shipments. It includes 2 shipments handled for Bennett & Co. which were interline and for which a receiver is complaining. It selects fresh shippers regularly but has received no traffic from Hastings. The transportation of meat and packinghouse products constitutes about 80 percent of its total revenue. Its vehicles are operating at about 80 percent of capacity to the West Coast and it has about 80 vehicles in the origin area involved.



Certificate No. 9 holds motor common carrier authority to transport dressed fresh meats and packinghouse products, equipment and supplies when moving to or from the warehouse, plants or other facilities of meat packinghouses over described regular route between Denver, Colo. and Chicago, Ill., serving the intermediate points of Omaha, Nebr. and Des Moines, Iowa, and the off-route point of Council Bluffs, Iowa. It transports meat products and meat byproducts and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in Descriptions in Motor Carrier Certificates, 61 M.C.C. 209 and 766 (but excluding hides and pelts, in bulk, from the facilities of packinghouses and those articles which because of their size or weight require the use of special equipment), restricted to the transportation of traffic originating at the plantsite and storage facilities of Wilson & Co., Inc. at or near Cheyenne, Iowa or Denver, Colo. and destined to points in Illinois, Iowa, Minnesota, Nebraska, South Dakota and Wisconsin. It holds no authority from the Interstate Commerce Commission to conduct any operations between points in the United States in Alaska or Hawaii.

in Motor Carrier Certificates, supra, from Denver and Greeley, Colo., to points in California, subject to the restrictions that the authority granted shall not be tacked or joined with any other authority now held by the carrier for the purpose of providing through service. Although Curtis maintains that it can tack parts (3) and (4) above at Denver, the restriction in (4) prohibits such tacking inasmuch as that authority was acquired after that in part (3). It has trailer interline arrangements with other motor carriers not parties hereto, on traffic originating at York, Omaha, Fremont and Scottsbluff, Nebr., Wichita, Hutchinson and Kansas City, Kans., and the Kansas cities. It operates 150 tractors and over 200 trailers, the majority of the trailers being 40 feet in length and equipped with mechanical refrigeration units. It also has on order six so-called double bottoms (two 27 foot trailers pulled by one tractor) which are particularly useful on shipments involving multiple pickups and deliveries. Terminals are maintained at Chicago, Sioux City, Omaha, Lexington, Nebr., Denver and Los Angeles. Every driver must call central dispatch in Denver every morning between 8 and 10 o'clock to report his location. Any breakdown not repairable within 30 minutes must be reported to Denver, which will make available another vehicle at the earliest possible time. Protestant will provide copies of delivery receipts to shippers, as it has done so for Bennett in serving that shipper from Denver until the plant closed sometime during the latter

part of 1966 or early 1967. Before that time it handled approximately 100,000 pounds a week for Bennett from Denver. It has handled a small volume for Bennett since that time. It has handled a small amount of traffic for Hoffman from Denver. It solicits both shippers. Scheduled timed deliveries are provided. At present it relies on exempt products (fresh fruits and vegetables) for 95 percent of the return move from California. Pork products move consistently all year to the West Coast and is considered very desirable traffic.

W. J. Digby, Inc., holds motor common carrier authority to transport meats, meat products and meat by-products and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, from Denver, Colo., to points in California, by which it interlines with a carrier not a party hereto traffic originating in Iowa, Nebraska, and Illinois. Those carriers provide a through trailer movement under that operation. At the time of the hearing in July it had temporary authority to transport meats, meat products, meat by-products and articles distributed by meat packinghouses as described in Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, from Sioux City, Iowa and Dakota City, Nebr., to points in California, and had an application for corresponding permanent authority pending. It operates 12 tractors with sleeper cabs and 30 trailers equipped with meat rails and mechanical refrigeration units.

Terminals are maintained at Denver, Los Angeles, Phoenix and Salt Lake City and check points at Cheyennee, Wyo., and Las Vegas and Reno, Nev.

Briefs were filed by applicant, by protestant Frozen Food Express, and jointly by protestants Midwest Coast, Refrigerated Foods, Ringsby, Digby, Digby of Iowa, Curtis, Midwest Emery, and Little Audrey's. Those briefs have been considered in full by the examiner.

Applicant here proposes to serve under continuing contracts two shippers, and to assign vehicles to those shippers' exclusive use. Thus, the operation proposed is that of a contract carrier by motor vehicle as defined in section 203(a)(15) of the act. In determining whether the issuance of a permit will be consistent with the public interest and the national transportation policy, section 209(b) of the act requires that consideration be given to the number of shippers to be served, the nature of the services proposed, the effect which granting the permit would have upon the services of protesting carriers, the effect of a denial upon the applicant and the supporting shippers, and the changing character of the shippers' requirements.

The situation here involves a recently organized corporation seeking to provide for one shipper (Hoffman) a service which that shipper has provided largely in private carriage operations, though to some extent by agricultural cooperatives, and for another shipper (Bennett) a service which has been provided largely by a co-

operative, but also by motor common carriers (including some protestants) and by piggyback operations. Regarding the nature of the service proposed, applicant has failed to establish that there is anything distinct or specialized about the service that differs essentially from that offered by motor common carriers, or that applicant is better able to meet the shippers' transportation requirements than are protestants. Protestants are authorized to provide service to most points sought by the application and some of them are transporting a portion of the involved traffic for Bennett. Although the shippers complain that they need a carrier authorized to serve all of the points and areas sought, particularly in order that multiple pickups and deliveries can be made, and willing and able to provide such accessorial services as placing advertising on the vehicles used and providing copies of delivery receipts and other shipping documents immediately after delivery of the shipments, the shippers have failed to establish that protestants are unable or unwilling to provide such services. Neither shipper has shown any particular familiarity with the services afforded by existing carriers and Hoffman appears to have made virtually no effort to utilize those services. The record thus fails to show that these shippers have any distinct needs which can better be met by applicant than by the protestants.

A grant of the application could adversely effect the operations of existing carriers inasmuch as a portion

of the traffic (that of Bennett) would be subject to diversion. On the other hand, a denial of the application would have no apparent adverse effect upon applicant, except insofar as it is now handling a limited amount of the traffic under temporary authority, as it would be left in its present position. And lastly, there is no evidence regarding any significant change in the character of either shipper's requirements that protestants would be unable or unwilling to meet. It is therefore concluded that the application should be denied.

Upon consideration of all evidence of record, the examiner finds that the granting of the authority sought by applicant would not be consistent with the public interest and the national transportation policy.

In view of the findings herein, the examiner recommends that the appended order be entered.

By James A. McKiel, Hearing Examiner.

(Signature) James A. McKiel
Recommended by James A. McKiel,
Hearing Examiner
(Signature) James A. McKiel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of

A. D. 1967.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC. CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)

EXHIBIT C.

Decision and Order.

SERVICE DATE
APRIL 30, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 3, held at its office in Washington, D.C., on the 18th day of April, 1968.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., CONTRACT CARRIER APPLICATION

(Beverly Hills, Calif.)

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions filed by applicant and the replies filed jointly by protestants Midwest Emery Freight System, Inc., and Little Audrey's Transportation Co., Inc., and jointly by Midwest Coast Transport, Inc., Refrigerated Foods, Inc., and Ringsby Truck Lines, Inc., W. J. Digby, Inc., of Iowa, W. J. Digby, Inc., and Curtis, Inc., and separately by Frozen Food Express, Inc.; and

It appearing, That the examiner recommended that the application be denied;

It further appearing, That the examiner in his report gave consideration to the statutory factor of the effect of a denial of the application on the supporting

shippers herein ((Section 209(b) of the Interstate Commerce Act)) and implied that such denial would have no apparent adverse effect on them in view of the available and apparently adequate service of protestants herein, but that he failed expressly to so conclude)

It further appearing, That the record herein warrants the conclusion that the denial of this application will have no apparent adverse effect on shippers in view of the available and apparently adequate service of protestants herein;

And it further appearing, That the pleadings present no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

Wherefore, and good cause appearing therefor:

We find, That the conclusions of the examiner should be, and they are hereby, modified to reflect a conclusion that a denial of the application will have no apparent adverse effect upon the shippers in view of the available and apparently adequate service of the protestants herein;

And we further find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the examiner; and that the statement of facts, the conclusions, and the findings of the examiner in his report, as modified herein,

being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 3, Members Mulhern, Merrill, and Bilodeau.

H. NEIL GARSON,
Secretary.

(SEAL)

EXHIBIT D.

Order.

SERVICE DATE
AUGUST 16, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 29th day of July , A.D. 1968.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC. CONTRACT CARRIER APPLICATION

(Beverly Hills, Calif.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed May 31, 1968, for reconsideration or, in the alternative, reopening of the proceeding for the purpose of receiving additional evidence tendered in the form of a verified statement by Stephen Levinson,

(2) Petition of Hoffman Brothers Packing Company, Inc., filed May 31, 1968, for leave to intervene, embracing a tendered petition for reconsideration and for reopening of the proceeding for receipt of additional evidence in the form of a tendered verified statement by Robert Levinson;

(3) Joint reply by Midwest Emery Freight System, Inc., and Little Audrey's Transportation Co., Inc., protestants, filed June 20, 1968, to the

petition in (1) and (2) above, embracing a motion to strike portions of said petitions;

(4) Reply by Frozen Food Express, protestant, filed June 20, 1968, to the petition in (1) above;

(5) Reply by Frozen Food Express, protestant, filed June 20, 1968, to the petition in (2) above;

(6) Joint reply by Midwest Coast Transport, Inc., Refrigerated Foods, Inc., Ringsby Truck Lines, Inc., W. J. Digby, Inc., of Iowa, W. J. Digby, Inc., and Curtis, Inc., protestants, filed June 24, 1968, to the petition in (1) and (2) above insofar as they seek relief other than intervention;

(7) Joint reply by Midwest Coast Transport, Inc., Refrigerated Foods, Inc., Ringsby Truck Lines, Inc., W. J. Digby, Inc. Of Iowa, W. J. Digby, Inc., and Curtis, Inc., protestants, filed June 24, 1968 to the petition in (2) above; insofar as it seeks leave to intervene;

and good cause appearing therefor:

It is ordered, That petitioner in (2) above be, and it is hereby permitted to intervene is said proceeding with the right to appear and participate in all further proceedings therein.

It is further ordered, That the tendered petition in (2) above be, and it is hereby, accepted for filing.

It is further ordered, That the said petitions in all other respects be, and they are hereby denied for the reasons (a) that the findings of Review Board Number 3 are in accordance with the evidence, (b) that,

even if the proceedings were reopened for the receipt of the evidence as set forth in the pleadings of applicant and Hoffman Brothers Packing Company, concerning their operations subsequent to the conclusion of the hearings held in this proceeding, such evidence would not warrant a result different than that reached in the decision and order of Review Board Number 3, of April 18, 1968, and (c) that no sufficient or proper cause appears for reopening the proceeding for reconsideration or further considering the matter.

It is further ordered, That in view of our action in the preceding paragraph the motion in (3) above be, and it is hereby, overruled.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

EXHIBIT E.

Federal Statutes.

Interstate Commerce Act, as amended, 49 U.S.C. 1, et seq.:

National Transportation Policy (54 Stat. 899 [preceding 49 U.S.C. Section 1.] (1940)):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulations of all modes of transportation subject to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences of advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

Section 309. Permits for Contract Carriers by Motor Vehicle.

(a)(1) Except as otherwise provided in this section and in Section 310a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business. . . .

(b) . . . Subject to Section 310, a permit shall be issued to any qualified applicant therefor, authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act:

In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit will have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. . .